IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 23RD JULY 2007 / 1ST SRAVANA 1929

SA.No. 878 of 1994()

(AGAINST THE JUDGMENT AND DECREE DATED 5/02/94 IN AS.59/1988 OF III ADDITIONAL DISTRICT COURT, THIRUVANANTHAPURAM ARISING FROM THE JUDGMENT AND DECREE DATED 31/03/87 IN OS.925/1983 of II ADDL.MUNSIFF, NEYYATTINKARA)

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APPELLANTS;APPELLANTS:DEFENDANTS 1 & 2:

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1. **KUNJUKRISHNA PILLAI JANARDHANAN PILLAI, RESIDING AT VETTAMANGALATHU THALASSERIKONATHU VALIYAVILA PUTHEN VEEDU, MARANALLOOR DESOM, MARANALLOOR VILLAGE.**

2. **KUNJUKRISHNA PILLAI MADHAVAN PILLAI OF ...DO.DO..**

BY ADV. SRI.V.GIRI

RESPONDENTS: RESPONDENTS:PLAINTIFF & 3RD DEFENDANT:

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1. **VELAYUDHAN PILLAI VIKRAMAN NAIR, RESIDING AT VETTAMANGALATHU VIJAYA SADANAM, MARANALLOOR DESOM, MARANALLOOR VILLAGE.**

2. **KUNJUKRISHNA PILLAI BALAKRISHNAN NAIR, RESIDING AT VETTAMANGALATHU THALASSERIKONATHU VALIYAVILA PUTHEN VEEDU, MARANALLOOR DESOM, MARANALLOOR VILLAGE.**

BY ADV. SRI.G.P.SHINOD
SRI. G.RAMMOHAN
SRI.G.UNNIKRISHNAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 878 OF 1994

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Dated this the 23rd day of July, 2007

JUDGMENT

Defendants in O.S.925/1983 on the file of Additional Munsiff Court, Neyyattinkara are the appellants. Plaintiff is the first respondent and second respondent the third defendant. First respondent instituted the suit seeking a decree for declaration of his title to the plaint schedule property and also for permanent prohibitory injunction contending that he has been in possession of the property under Ext.A2 assignment deed. Appellants and respondents are the children of Kunjukrishna Pillai. Plaint schedule property is the southern 3.250 cents of 6.50 cents which was allotted to Ambujakshi Amma as plot No.23 under Ext.A1 partition deed. On the death of Ambujakshi Amma, her rights devolved on her two sons Ramachandran Nair and Vikraman Nair. Under Ext.A2, first respondent purchased one half right being the

southern 3.250 cents and under Ext.A3 appellants purchased the northern 3.250 cents. Appellants resisted the suit contending that Ambujakshi Amma was not in possession of the property and under Ext.A2 first respondent did not obtain any right or title or possession and therefore first respondent is not entitled to the decree sought for. Since the identity of the property was disputed PW2 was appointed as the Commissioner. Commissioner submitted Ext.C1 report along with Ext.C1(a) and C1 (b)plan. Ext.C1(a) plan was prepared in accordance with the lie of the property and Ext.C1(b) plan was prepared which according to Commissioner should be the property, if it is located with reference to the links line provided in the plan accompanying Ext.A1 partition deed. It was so prepared stating that that links line as provided in the plan is not available in the property. On the side of the first respondent, first respondent as PW1 and Commissioner as PW2 were examined. Exts.A1 to 10 were also marked. Exts.C1 to C1(b) were also

marked. Appellants did not adduce any evidence, either documentary or oral. Learned Munsiff accepted Ext.C1(a) plan and fixed A B K L as the plaint schedule property and plot B C K J as 3.250 cents obtained by appellants under Ext.A3 and declared title of respondents to plot A B K L and granted a decree for injunction. Appellants challenged decree and judgment before District Court, Thiruvananthapuram in A.S.59/1988. Learned District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the Second appeal.

2. The appeal was admitted formulating the following substantial questions of law.

1) Whether courts below were justified in granting a decree on the basis of the lie of the property when the suit is based on a partition deed and parties claim their right under the partition deed?

2) Whether courts below were justified in

granting an injunction when appellants are in uninterrupted possession of the property?

3) When a plan or report is found to be not acceptable, is it not the duty of the court to remit the same and obtain fresh plan and report?

3. Learned counsel appearing for appellants and first respondent were heard.

4. The argument of learned counsel appearing for appellants was that along with Ext.A1 partition deed, Ext.A10 plan was appended wherein the properties allotted to different sharers were shown and the Commissioner should have fixed the disputed property on the basis of that plan and as it is not so done courts below should not have accepted Ext.C1(a) plan and should have accepted Ext.C1(b) plan and if it is insufficient the report and plans should have been set aside or remitted and Commissioner should have been directed to furnish a proper plan after proper identification of the property. It was also argued that in the plaint itself plaint schedule

property was described with reference to the plan appended to Ext.A1 partition deed and in such circumstance, without proper identification with reference to that plan in Ext.A1, courts below should not have granted the decree.

5. Learned counsel appearing for first respondent argued that Ext.C1(b) plan was rejected by courts below as it was prepared only on the basis of surmises and existence of a compound wall on A L line marked by the Commissioner in Ext.C1(a) plan establish and it was not disputed that and it is the northern boundary of plot No.20 allotted to the plaintiff and 3.250 cents covered under Ext.A2 was purchased as a way to the property which was being used as a way even earlier and that way could only be to the north of A L line and the Commissioner correctly demarcated the same in Ext.C1(a) plan and both the courts accepted the same and in such circumstance, there is no reason to interfere with the identification of the property. It was also pointed out that as per

Ext.A1 partition deed an extent of 79 cents less 6 ½ cents covered under plot No.6 was allotted to appellants and along with that appellants have purchased 3.250 cents covered under Ext.A3 sale deed and the total extent owned by them can only be less than 79 cents and as per Ext.C1(a) plan even after excluding the plot A B K L appellants are in possession of more extent than 79 cents and in such circumstance there is no reason to interfere with the decree granted by courts below. Learned counsel also argued that what was contended by appellants in the written statement was that first respondent did not get any right under Ext.A2 sale deed and Ambujakshi Amma was never in possession of the property and courts below on the evidence found that Ambujakshi Amma was in possession of the property much earlier and eventhough decree for redemption was obtained possession was not taken from her and in such circumstance, courts below found that plaint schedule property is demarcated in Ext.C1(a) plan and there is no reason to

interfere with the decree.

6. Under Ext.A1 partition deed the family properties were divided in 1952. Ext.A10 plan shows the division of 20.97 ¼ acres in the survey sub division. Plot No.6 having an extent of 69 cents is on the northern side of plot No.20 having an extent of 65 cents. As per Ext.A1 in southern most 6 ½ cents included in plot NO.6 was allotted to Ambujakshi Amma. Out of the 65 cents in plot No.20, the northern 45 cents belongs to plaintiff and southern 20 cents belongs to his brother. Plot No.23 is the southern 6 ½ cents allotted to Ambujakshi Amma. As per Ext.A1 partition deed excluding 6 ½ cents allotted as plot No.23, remaining extent of 72 ½ cents was allotted to Kunjukrishna Pillai and his wife Rugmini Pillai. Though appellants contended that Ambujakshi Amma was not in possession of property and therefore under Ext.A2 sale deed, first respondent did not obtain right or possession of that property, courts below found that Ext.A7 plaint in the

earlier suit, O.S.37/1982 establish the possession of Ambujakshi Amma in respect of 6 ½ cents even at the time of filing of the said suit. Courts below also found that there is no evidence to prove that there was any interference with that possession of Ambujakshi Amma, in spite of Ext.A5 decree and A6 judgment and therefore first respondent has title to the plaint schedule property obtained under Ext.A2. This aspect was not disputed. The argument is only with reference to the correctness of the identification made by the Commissioner in Ext.C1(a) plan. Learned counsel vehemently argued that Commissioner has not identified the property with reference to Ext.A10 plan (the plan appended to Ext.A1 partition deed) and Commissioner was not directed to measure the property with reference to the lie of the property and as Ext.C1(a) plan was prepared on the basis of the lie of the land it should have been ignored and Ext.C1(b) plan should have been accepted.

7. Though identification of the disputed

property was challenged, the fact that appellants are in possession of the property which lies to the south of GF line, as demarcated by the Commissioner in Ext.C1(a) plan was not disputed. So also possession of appellants to the south of G F line upto the K B line on the north as demarcated by the Commissioner in Ext.C1(a) plan was also not in dispute. The said extent in the possession of appellants exceed the extent available to them under Ext.A1 and A3 assignment deed subsequently obtained in respect of 3.250 cents which is part of plot No.23 allotted to Ambujakshi Amma under Ext.A1 partition deed. Though learned counsel appearing for appellants vehemently argued that courts below without any basis accepted Ext.C1(a) plan, it was pointed out by learned counsel appearing for respondents that the existence of a wall on A L line, which is the northern boundary of plot No.20 separating it from plot No.6 was pleaded in the plaint itself and that boundary was found by the Commissioner also.

Therefore A L line is the northern boundary of plot 20 which is the southern boundary of plot No.6 and 6.50 cents allotted as plot No.23 under Ext.A1 could only be further to the north of A L line. Commissioner has demarcated this as plot A B C J K L. It was accepted as correct by courts below. Though evidence establish that Ext.C1(a) plan is not prepared with reference to Ext.A10 plan appended to Ext.A1 partition deed, as the links line provided in Ext.A10 is not available at present and in view of the fact that there is a fixed boundary on A L line, the property could only be fixed as has been done by the Commissioner in Ext.C1(a) plan. It is for that reason courts below accepted Ext.C1(a) plan, and rejected Ext.C1 (b) plan which was prepared by Commissioner on the assumption that if the links line as provided in Ext.A10 plan is to be taken, the disputed property could only be further towards the south of A L line. In the light of the evidence on record and the fact that appellants are in possession of more

extent than what is available to them under Ext.A1 and A3, I do not find any reason to interfere with the concurrent decree and judgment passed by the courts below.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

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M.SASIDHARAN NAMBIAR, J.

S.A.NO.878 /94

JUDGMENT

23rd JULY, 2007